81 -2278

No.

Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF KIRKWOOD, MISSOURI, a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT F. SCHLAFLY
CHARLES G. SIEBERT
ANN E. BUCKLEY
SCHLAFLY, GRIESEDIECK, FERRELL & TOFT
314 N. Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-0845
Attorneys for Petitioner Union Electric Company

June 10, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS FOR REVIEW

I. Whether the United States Court of Appeals for the Eighth Circuit erred in deciding that the First Amendment, as interpreted by the *Noerr-Pennington* doctrine, did not protect petitioner, an electric utility, from antitrust liability in damages based solely on its collection of rates pursuant to statutory procedures on requests for rate increases filed with the federal and state regulatory agencies, where it was not alleged that such filings were an abuse of the administrative process or a sham?

II. Whether the United States Court of Appeals for the Eighth Circuit erred in deciding that the state-action and implied-repeal rules do not bar antitrust liability in damages of petitioner, an electric utility, where the violation is based solely on its use of rates filed with the respective federal and state agencies?

III. Whether the United States Court of Appeals for the Eighth Circuit erred in holding that electricity is a "commodity" within the meaning of the *Robinson-Patman Act*?

TABLE OF CONTENTS

	Page
Questions for Review	i
Opinions and Orders Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	2
The Complaint	3
District Court Decision	4
Court of Appeals Decision	4
Argument	5
I. The decision below is in conflict with the *Noerr-Pennington* decisions of this Court by its holding that the First Amendment protection from antitrust liability is lost if the requests to the government achieve anticompetitive results.	5
II. In holding that the antitrust laws apply where the only violation alleged is the effect of the electric rates filed with the federal and state regulatory commissions, the decision below conflicts with the principles of implied repeal, set out in *Gordon* v. *New York Stock Exchange*, and of state-action exemption, set out in *Parker* v. *Brown*.	9

III. The decision that electricity is a "commodity" under the Robinson-Patman Act presents an important question of federal law which should be settled by this Court. ... 14

Conclusion 18

Appendix:

A. Opinion of the Court of Appeals A-1

B. Order of the District Court A-18

C. Memorandum of the District Court A-19

D. Order and Judgment of the Court of Appeals A-25

E. Order of the Court of Appeals Denying Appellee's Petition for Rehearing A-26

F. Complaint A-27

G. Amendment to the Complaint A-35

H. Text of Constitutional Provision Relied on, United States Constitution, First Amendment A-37

I. Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d ... A-38

Federal Power Act §206(a), 16 U.S.C. §824e (a) A-40

Sherman Act §1, 15 U.S.C. §1 ..... A-41

Sherman Act §2, 15 U.S.C. §2 ..... A-41

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a) A-42

Clayton Act §4, 15 U.S.C. §15 ..... A-43

Clayton Act §11(a), as amended, 15 U.S.C. §21(a) A-43

Missouri Revised Statutes §393.130 ..... A-44

Missouri Revised Statutes §393.140 ..... A-45

Missouri Revised Statutes §393.150 ..... A-47

Missouri Revised Statutes §393.260 ..... A-48

Missouri Revised Statutes §393.270 ..... A-49

TABLE OF AUTHORITIES

Cases:

Ambook Enterprises v. Time, Inc., 612 F.2d. 604 (2d.Cir. 1979) 16

American Telephone & Telegraph Co. v. Delta Communications, Inc., 579 F.2d. 972 (5th.Cir. 1978), affirming 408 F.Supp. 1075 (S.D.Miss. 1976) 16

Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d. 1186 (5th.Cir. 1978), rehearing denied 570 F.2d. 1391 16

Baum v. Investors Diversified Services, Inc., 409 F.2d. 872 (7th.Cir. 1969) 16

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5,6

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 5,6,7,9,10,12

City of Gainesville v. Florida Power & Light Co., 488 F.Supp. 1258 (S.D. Fla. 1980) 17

City of Groton v. Connecticut Light and Power Co., 497 F.Supp. 1040 (D.Conn. 1980), affirmed in part, reversed in part 662 F.2d 921 (2d.Cir. 1981) .. 16

City of Lafayette, Louisiana v. Louisiana Power and Light Co., 435 U.S. 389 (1978) 8

City of Newark v. Delmarva Power & Light Co., 467 F.Supp. 763 (D.Dela. 1979) 16

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 5,6,7,8,9

Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976) 11,13

Federal Prescription Service, Inc. v. American Pharmaceutical Association, 663 F.2d. 253 (D.C.Cir. 1981) 8

Forro Precision, Inc. v. International Business Machines, 673 F.2d 1045 (10th.Cir. 1982) 9

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 10,11

Hydro-Tech. Corp. v. Sundstrand Corp., 673 F.2d. 1171 (10th.Cir. 1982) 8

May Department Stores Co. v. Union Electric Co., 341 Mo. 299, 107 S.W.2d. 41 (Mo. 1937) 13

Miracle Mile Associates v. City of Rochester, 617 F.2d. 18 (2d.Cir. 1980) 9

Otter Tail Power Co. v. United States, 410 U. S. 366 (1973).....9,10,12

Parker v. Brown, 317 U.S. 341 (1943) 9

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 5,6,7,8,9

Constitutional Provisions:

United States Constitution, First Amendment 2,4,5

Statutes:

Sherman Act §1, 15 U.S.C. §1 2,3

Sherman Act §2, 15 U.S.C. §2 2,3

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a) 2,3,14,15

Clayton Act §11(a), as amended, 15 U.S.C. §21(a) 14,15

Missouri Revised Statutes (1978) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,
Petitioner,

VS.

CITY OF KIRKWOOD, MISSOURI, a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Union Electric Company, respectfully prays that a Writ of Certiorari be issued to review the order and judgment and the opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on March 4, 1982, and with respect to which that court denied petitioner's Motion for Rehearing on March 31, 1982.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the Court of Appeals, reported at 671 F.2d 1173 and at 1982-1 CCH Trade Cas. ¶64,574, are reproduced in the Appendix at p. A-1 and p. A-25 respectively. The December 31, 1980 Order and Memorandum of the District Court, not published, are reproduced at p. A-18 of the Appendix.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit were entered on March 4, 1982. The petitioner's Petition for Rehearing was denied on March 31, 1982. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL PROVISION INVOLVED

This Petition involves the constitutional issue of conflict between the First Amendment right to petition the government for a redress of grievances and the imposition of liability in damages for violation of the Sherman Act based solely on petitioner's exercise of its right to petition the federal and state regulatory agencies by filing its electric rate schedules for approval and by collection of the filed rates pursuant to federal and state statutes.

STATUTES INVOLVED

The Petition involves a determination whether there is an implied repeal with respect to antitrust injury caused by electric rates, of Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act, by reason of Sections 205 and 206(a) of the Federal Power Act and Sections 393.130 through 393.270 of the Revised Statutes of Missouri, 1978, regulating rates charged by electric utilities in the respective federal and state jurisdictions. The Petition also involves a construction of the Robinson-Patman Act, Section 2(a) of the Clayton Act, as amended by 15 U.S.C. §13(a). These federal and Missouri statutes are set out in the Appendix at pages A-38 through A-50.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked by the Complaint alleging violations of Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2, and §2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 USC §13(a).

Union Electric Company (the "Company") is an electric utility engaged in the generation, transmission and distribution of electric energy for sale at both retail and wholesale. The City of Kirkwood, Missouri, a municipal corporation (the "City") has no generation facilities, but purchases electricity at wholesale from the Company and distributes it through its electric distribution system, which comprises approximately two-thirds of the area of the City. The Company distributes electricity at retail in the other one-third.

The Complaint

The complaint, as amended, seeks declaratory and injunctive relief and treble damages for alleged violations of Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The Complaint, filed by the City on September 1, 1977, and amended on November 23, 1977, alleges that the Company monopolized and attempted to monopolize interstate trade and commerce in the retail distribution and sale of electric power. The City alleged that the Company, by its filings for wholesale and retail rate increases, with the Federal Power Commission (now the Federal Energy Regulatory Commission) and the Missouri Public Service Commission, respectively, created a "price squeeze" or disparity between the wholesale and retail electric rates, which prevented the City from selling power to its customers at the same rate charged by the Company to its retail customers.

Discovery disclosed that the City has participated actively, with other municipal customers, in the proceedings on the Company's wholesale rate filings before the federal Commission.

The Complaint also alleged violations of the *Robinson-Patman Act,* 15 U.S.C. §13(a). These claims were dismissed by the District Court on January 23, 1978, on the Company's motion on the grounds that electricity is not a "commodity" within the meaning of the statute, and that the Complaint did not suf-

ficiently allege sales occurring in interstate commerce. By its Motion of July 24, 1980, the City sought reconsideration of the Order of Dismissal, or in the Alternative, Leave to Amend. This Motion was never ruled.

Neither the Complaint nor the amendments to the Complaint, allege that petitioner engaged in improper or unlawful conduct other than the price-squeeze effect of its electric rates filed with the federal and state commissions.

District Court Decision

On December 31, 1981, the District Court granted summary judgment for the Company on the grounds that comprehensive federal and state regulation of the Company's wholesale and retail rates, respectively, exempted those rates from antitrust challenge, and that in addition, the First Amendment, as interpreted under the *Noerr-Pennington* doctrine, precluded antitrust liability based on the Company's activities in the filing of rate tariffs with the federal and state regulatory authorities and the collection of those rates. The Order of the District court is set out in the Appendix, at page A-18.

Court of Appeals Decision

The Court of Appeals rejected each of the legal grounds for the District Court's judgment and in addition held that electricity was a "commodity" within the meaning of the *Robinson-Patman Act*. The Court of Appeals reversed the summary judgment for the Company and remanded the cause for further proceedings in the District Court. The Opinion of the Court of Appeals is set out in the Appendix at page A-1; and published in 671 F.2d 1173.

ARGUMENT

I.

The Decision Below Is In Conflict With The Noerr-Pennington Decisions Of This Court By Its Holding That The First Amendment Protection From Antitrust Liability Is Lost If The Requests To The Government Achieve Anti-Competitive Results.

The District Court and the Court of Appeals dealt with this antitrust case as resting solely on the "price-squeeze" allegations. The Complaint as amended does not allege other conduct as grounds for antitrust violation, or that the rate filings by the Company were not made in good faith to obtain the requested increases.

In holding that the First Amendment right to petition the government does not protect the Company from risk of damages for antitrust violation arising solely from use of its filed rates because of anti-competitive results (the "price squeeze"), the opinion improperly limited the First Amendment constitutional right defined by this court in its *Noerr-Pennington* decisions: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), 81 S.Ct. 523; *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), 85 S.Ct. 1585.

The opinion misinterprets the decisions of this Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), 92 S.Ct. 609, and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), 96 S.Ct. 3110, by relying on them in support of its conclusion that if the purpose or end-result of the petition for governmental action is anti-competitive, the First Amendment protection from antitrust damages is lost.

These conflicts with controlling decisions of the Supreme Court on the scope of the *Noerr-Pennington* doctrine are shown by the lower court's statement in its opinion (671 F.2d at 1181):

"*Noerr* protects the right to make one's views known to the government, but *Cantor* and *Trucking Unlimited* make clear that the right may not be used as a pretext to achieve otherwise unlawful results. "If the end result is unlawful, it matters not that the means used in violation may be lawful." *Trucking Unlimited,* 404 U.S. at 151. The Noerr-Pennington doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results."

In fact, the quotation from *Trucking Unlimited,* relied on by the court, referred to the "sham" exception to the *Noerr-Pennington* doctrine, not to the doctrine itself. The basic holding of *Trucking Unlimited,* that the First Amendment protects petitions for governmental action even though the action sought and obtained may have direct anti-competitive results, is summarized in this statement by this Court:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." (404 U.S. at 510-511)

The court below apparently misconstrued this reference as meaning that a *genuine* exercise of First Amendment rights would not be protected if it had anti-competitive effects. As noted by the District Court in its order, there is no contention in the present case that the rate filings made by the Company with the Missouri Public Service Commission or with the Federal Energy Regulatory Commission were "sham", or that the City was harassed or deterred by the Company in any manner from access to the regulatory commissions to be heard in opposition to the rate filings. Accordingly, the "sham" exception to First Amendment protectin has no application. The Court of Appeals opinion created a new exception—that the First Amend-

ment right is lost if the result sought from the agency is "unlawful", i.e., anti-competitive—which would swallow the entire *Noerr-Pennington* doctrine. The essence of that doctrine is that a genuine exercise of the First Amendment right to petition the government is protected from antitrust liability "even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." (*United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, at 1593.)

The opinion eliminates the *Noerr-Pennington* doctrine when the exercise of the First Amendment right is "to achieve anti-competitive results." That holding is in direct conflict with this Court's decisions which enunciated the doctrine, for there would be no need of the constitutional protection of the First Amendment from the antitrust laws if anti-competitive purpose or results were not present.

The lower court's reliance on *Cantor* as limiting the scope of *Noerr-Pennington* is not justified. The only reference in *Cantor* to the *Noerr-Pennington* doctrine, including the quotation used in the lower court's opinion, is in part IV of the *Cantor* opinion which was not concurred in by a majority of the Justices. The *Cantor* decision did not turn on the *Noerr-Pennington* doctrine, as shown by this Court's statement of its conclusion (428 U.S. at 598):

> "We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program."

We have not found any later decision which cited *Cantor* as limiting the *Noerr-Pennington* doctrine. On the contrary, there are decisions of this Court and of other circuit courts holding that a genuine exercise of the First Amendment right to petition

the government is protected from antitrust liability regardless of anti-competitive purpose or result. In *City of Lafayette, Louisiana* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978), this Court described the *Noerr* holding as follows (at page 1129):

> "In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 128, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Court held that, regardless of anti-competitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws."

In the same case this Court summarized the *Pennington* decision:

> "*Pennington* held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying before the Secretary of Labor in favor of legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying before TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack." (at page 1129, footnote 17)

The unique modification of the *Noerr-Pennington* doctrine by the Court below is in conflict also with a number of decisions in other circuits, exemplified by: *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association*, 663 F.2d 253 (1981), where the District of Columbia Circuit rejected the contention that anti-competitive intent removes the protection of *Noerr; Hydro Tech Corporation* v. *Sundstrand Corporation*, 673 F.2d 1171 (1982), in which the Tenth Circuit upheld the *Noerr-Pennington* immunity from antitrust liability even

though the purpose of the challenged conduct was admittedly anti-competitive; *Forro Precision, Inc.* v. *International Business Machines,* 673 F.2d 1045 (1982), where the Ninth Circuit applied the *Noerr-Pennington* doctrine to communications with police even though made with anti-competitive intent; *Miracle Mile Associates* v. *City of Rochester,* 617 F.2d 18 (1980), where the Second Circuit held that anti-competitive intent and results do "not eradicate the First Amendment protections which underlie the *Noerr-Pennington* doctrine." (at page 21).

• • •

This Court's review of the Eighth Circuit's decision is necessary because the holding below is in conflict with the applicable decisions of this Court on an important matter of federal law and constitutional protection.

II.

In Holding That The Antitrust Laws Apply Where The Only Violation Alleged Is The Effect Of The Electric Rates Filed With The Federal And State Regulatory Commissions, The Decision Below Conflicts With The Principles Of Implied Repeal, Set Out In Gordon v. New York Stock Exchange, And Of State-Action Exemption, Set Out In Parker v. Brown.

This Court has ruled that the intensive regulations of the electric power industry by the Federal Power Act and by the statutes of the various states does not confer any general exemption or immunity from the federal antitrust laws (*Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), 96 S.Ct. 1022, *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110 (1976).) The alleged violations of the antitrust laws in those cases involved various activities other than the filed electric rates. As the challenged conduct was not authorized or required by federal or state law, the Court considered it outside the principles upon which the rules of implied repeal and state action are based.

This Court has not ruled on the different question presented by the present case: whether antitrust liability in damages may be imposed upon an electric utility where the alleged violation is based *solely* on the economic effect of its rates filed with the respective federal and state commissions. The court below erred in applying the decisions of this Court in *Otter Tail* and *Cantor* to the significantly different facts of the present case, and in failing to follow the decision of this Court in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 96 S.Ct. 2598 (1975), which is this Court's decision closest to the present case in dealing with regulated prices as an antitrust violation.

The Implied Repeal Issue

The doctrine of implied repeal of the antitrust laws has been expressed by this Court in the context of a variety of legislative provisions. If there is a plain repugnancy between the antitrust and the regulatory provisions, repeal or immunity for the specific conduct authorized or compelled by the statute will be implied. In *Gordon,* this Court held that the setting of commission rates by the New York Stock Exchange pursuant to the rules and active supervision of the S.E.C. was not subject to the antitrust laws although the specific conduct under antitrust attack was price fixing among competitors, which would be a per se violation absent implied immunity. The Court found a repugnancy between the regulation of commission rates by the S.E.C. under the Securities Exchange Act and subjecting those regulated rates to the decisions of courts and juries in private antitrust suits. The Court said (422 U.S. at 689):

> "It is clear from our discussion in Part III, *supra,* that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the S.E.C. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or

of the S.E.C. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the S.E.C. must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the S.E.C., the confidence the Congress has placed in the agency, and the active roles the S.E.C. and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme."

The quoted language, and the rule of *Gordon,* are applicable to the present case but were not followed by the court below. FERC's statutory regulation of the Company's wholesale rates (including its responsibility to consider the anti-competitive effects of a potential price squeeze as required by the *Conway* decision), is more direct and complete than was the authority of the S.E.C. over commission rates. The complexity of the factors to be considered in determining a "just and reasonable" wholesale electric rate is much greater than the determinants of appropriate commissions on the sale of securities. Electric rates involve analysis of complex and technical engineering and accounting factors, in addition to the exercise of expert judgment on economic and investment questions. In reaching its determination, the agency must reconcile the objectives of the Act in setting fair and nondiscriminatory rates for the user and in preserving the ability of the utility to obtain sufficient revenues for reliable, safe service for the public and a reasonable return to the investors who furnish the necessary capital.

To allow an individual member of the wholesale class, such as the City, to attack the validity of the filed rate or the rate as finally determined by FERC, by an antitrust action asserting damages by reason of the rate itself, clearly would interfere with the regulatory process and disrupt the statutory scheme of

uniformity of rate for customers of the same class. A decision on this antitrust claim of damages caused by the Company's filed rate necessarily requires a determination by the trial court or jury of what the proper wholesale rate should be. Such determination has been vested by Congress in the sole jurisdiction of the federal agency, subject to court review only on appeal from the order fixing the rate.

The Court below failed to recognize the essential fact differences in *Otter Tail* and in *Cantor* from the present case. In those cases the Court was dealing with challenged conduct which was unrelated to the regulation of rates and in both cases the Court found no repugnancy between the application of the antitrust laws to the challenged conduct and the effective working of the statutory, regulatory scheme.

It is obvious that rate regulation, unlike the furnishing of free light bulbs as in *Cantor,* and the engaging in baseless, repetitive litigation and similar activities as in *Otter Tail,* is central to the regulatory scheme of the Federal Power Act and of the Missouri Public Service Commission law. It is clear that the state and federal commissions are the key deciding forces in determining the legal rates which can be charged in the respective jurisdictions. In each instance, the governmental agency approves or fixes the legal rate so as to displace the antitrust law with respect to any injury claimed to be inflicted by the rates alone.

The State Action Issue:

The Court below rejected the doctrine of state-action in the present case on the ground that the facts in the instant case cannot be distinguished from those in *Cantor,* and because the alleged price squeeze violation does not satisfy the two criteria this Court set out in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937 (1980). The Court ignored the fact that the challenged conduct

in *Cantor* was irrelevant to the central function of the state regulatory statute and that the state's interest in regulating the distribution of electricity would not be impaired by an antitrust suit concerning the light bulb program as to which the state policy was neutral.

In contrast, the regulation of rates is central to the Missouri regulatory scheme and the PSC actively regulates the rate-making process and fixes the legal rates to be charged. The Missouri Supreme Court has declared that the state's public service law, particularly its rate-making sections, are meant to be a substitute for competition:

> "This law was the result of growing feeling that such competition, as existed in this field, was inadequate to protect the public. It provided, in lieu of competition and the right of private bargaining, impartial treatment of every one under regulations approved and enforced by the state .... that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service."
>
> (*May Department Stores Co.* v. *Union Electric Company* 107 S.W.2d 41 at 48 (Mo. S.Ct. 1937)

The Court below misapplied the *Midcal* tests by assuming that the anti-competitive "price squeeze" is within the control of the Company, independent of the actions of the regulatory agency, and that there is no active supervision of the problem. The Eighth Circuit, without justification, belittled the fact that under this Court's *Conway* decision, FERC must consider the relationship of the two rates and must adjust the federal rate to the lower zone of reasonableness where necessary to correct a

disparity. As FERC carries out this responsibility in its rate hearings (including its proceedings involving the rates in issue in the present case), a continuing price squeeze can result only because the state-set rate is too low. In fact, the Complaint in the present case, in paragraph 12-A, alleges that the unreasonable and discriminatory levels of the Company's retail rates are the cause of the price squeeze. As the retail rates are set by the Missouri commission, and not by the Company, the rates are state-action. Under the state-action doctrine, the Company cannot be liable under the antitrust laws either for the rates fixed by the state or for an indirect effect upon the plaintiff which the Company cannot control.

Contrary to the statement of the Court below, in the circumstances of the present case the conjunction of federal and state regulation has caused the existence of a relation between the two rates which is the subject of the Complaint. As the state action is the effective cause, the Court's rejection of the doctrine is contrary to *Midcal* and requires review by this Court.

III.

The Decision That Electricity Is A "Commodity" Under The Robinson-Patman Act Presents An Important Question Of Federal Law Which Should Be Settled By This Court.

The question whether electricity is a "commodity" within the meaning of the *Robinson-Patman* Act has not yet been ruled by this Court and has received divided treatment in the lower federal courts. If, as the Eighth Circuit held, the sale of electricity falls within the *Robinson-Patman* Act, there is an apparent conflict between the Federal Power Act, which vests the Federal Power Commission, and its successor, the Federal Energy Regulatory Commission, with responsibility for review of electric rates, and the *Robinson-Patman* Act which gives to the Federal Trade Commission authority to review prices of all other enterprises except those specifically assigned in §21(a) to a

particular agency. The Federal Trade Commission is not charged with the regulation of any other aspects of the electric industry and has no particular expertise in that area. It is unreasonable to assume that Congress in enacting the *Robinson-Patman* Act in 1936 intended to subject electric rates to the authority of the Federal Trade Commission when in 1935 it had delegated that responsibility to the Federal Power Commission, a special agency created for the purpose of regulating the electric power industry.

The decision below is contrary to the language and history of the statute and to the weight of authority concerning the definition of "commodities". Section 2(a) of the *Clayton* Act, as amended by the *Robinson-Patman* Act forbids direct or indirect discrimination in price "between different purchasers of commodities of like grade and quality ..." The terms "like grade and quality" are appropriate in referring to goods, wares and merchandise, but not with respect to electricity. The House and Senate reports which accompanied the original *Clayton* Act use the words "goods, wares and merchandise" interchangeably with "commodities". H.R. Rep. No. 627, 63rd Cong., 2d Sess. 8, 11 (1914); S. Rep. No. 698, 63rd Cong., 2d Sess. (1914). There is no indication that the *Robinson-Patman* Act was intended to broaden the scope of the statute to include electricity as a "commodity". One year prior to the passage of the *Robinson-Patman* Act in 1936, the Congress had amended the Federal Power Act to provide for F.P.C. review of all rates charged for the transmission or sale of electric power subject to its jurisdiction, including review of any disparity in rate between categories of purchaser so as to prohibit unreasonable discrimination. The *Robinson-Patman* Act, 15 U.S.C. §13(a) gives authority to fix and establish quantity limits as to "particular commodities or classes of commodities" not to the Federal Power Commission, but to the Federal Trade Commission. The Act at 15 USC §21(a) gives authority to enforce compliance with §13(a) to the various federal agencies having

regulatory authority over the type of entity charged with a violation. Thus the Interstate Commerce Commission has authority with respect to common carriers, the Federal Communications Commission with respect to carriers engaged in wire or radio transmissions, the Civil Aeronautics Board with respect to air carriers, the Federal Reserve Board with respect to banks, and the Federal Trade Commission where applicable to all other character of commerce. The omission of any reference to the Federal Power Commission, together with the Federal Power Act's entrustment of electric rate review to the Federal Power Commission, indicate clearly that Congress did not intend that the *Robinson-Patman* Act be applied to rates for electric service.

The Courts of Appeal have held that the term "commodity" is "restricted to products, merchandise or other tangible goods." *Baum* v. *Investors Diversified Services, Inc.*, 409 F.2d 872, 874-875 (7 Cir., 1969). The dominant nature of the transaction determines whether it is the sale of commodities, and where a transaction involves a substantial element of service, it is not covered by the Act. *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186 (5 Cir., 1978), rehearing denied, 570 F.2d 1391; *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604,609 (2 Cir., 1979).

The Fifth Circuit in *American Telephone and Telegraph Company* v. *Delta Communications, Inc.*, 579 F.2d 972 (1978) adopted the opinion of the District Court at 408 F. Supp. 1075, 1114 (S.D.Miss. 1976) holding that the transmission of network television signals by cable, which involves electricity, is not the sale of a commodity within the meaning of the Act.

Two District Courts have considered this question and held that electricity is not a "commodity" under the *Robinson-Patman* Act: *City of Newark* v. *Delmarva Power and Light Co.*, 467 F.Supp. 763 (1979) D.Dela., followed by the District Court in Connecticut in *City of Groton* v. *Connecticut Light and*

Power Co., 497 F.Supp. 1040 (D.Conn., 1980). The Eighth Circuit, without discussion of the legislative history or of the specific language of the *Robinson-Patman* amendment held that electricity is a commodity for this purpose. The Court cited in support the District Court opinion in *City of Gainesville* v. *Florida Power and Light Company*, 488 F.Supp. 1258, (S.D.Fla., 1980), which viewed electricity as similar to "other forms of energy" which have been held to be within the Act, such as coal and gasoline. Apart from the legislative history, the flaw in this reasoning is that coal and gasoline are fuels which have "grade and quality" which can be determined and compared, which is not true of electric energy.

CONCLUSION

The Court's review of this case is needed to clarify the law in the important areas of (1) the proper scope of the *Noerr-Pennington* doctrine when electric utilities (and other regulated entities) are charged with antitrust liability due solely to rates filed in good faith with governmental agencies; (2) the application of the principles of implied repeal and state-action exemption to the conflict between the antitrust laws and the regulation of electric rates, where the only violation claimed is a price-squeeze caused by the rates filed with the regulatory agencies; and (3) whether Congress intended the *Robinson-Patman* Act to supplant, or supplement, the jurisdiction of the Federal Power Commission and the state public service commissions over the fairness of electric rates, by granting such authority to courts and juries in price discrimination actions.

The errors of the Court below on these issues require review by this Court to correct the improper result reached in the present case, and to forestall similar confusion in numerous other cases.

Respectfully submitted,

Robert F. Schlafly
Charles G. Siebert
Ann E. Buckley
SCHLAFLY, GRIESEDIECK,
FERRELL & TOFT
314 North Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-0845
Counsel for Petitioner